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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

GEORGE H. EDDY AND H. C. CROSS, as Receivers of the Missouri, Kansas & Texas Railway Company, *Appellants,*

vs.

ANNIE LETCHER, Intervenor, Etc., *Appellee.*

No. ~~1020.~~ 582

APPELLEE'S MOTION, STATEMENT AND BRIEF.

JAMES P. WOOD,
Solicitor for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

GEORGE H. EDDY AND H. C. CROSS, as Receivers of the Missouri, Kansas & Texas Railway Company, *Appellants,*

vs. **No. 1026.**

ANNIE LETCHER, Intervenor, Etc., *Appellee.*

APPELLEE'S MOTION, STATEMENT AND BRIEF.

Motion to Dismiss Appeal.

And now comes Annie Letcher, Intervenor and appellee in the above entitled cause, and moves the court to dismiss the appeal herein for want of jurisdiction, and for grounds of her motion assigns the following:

First. Because the court has no jurisdiction to hear, try or determine said cause.

Second. Because the jurisdiction in this cause, in the first instance, in the United States Circuit Court for the district of Kansas, as fully appears by the original complaint filed in said Court (a duly certified copy of which said complaint is herewith filed and marked "Exhibit A." and is made a part of this motion, and it is prayed that this Court will consider the same as a part hereof) was dependent solely on

the fact that the opposite parties to said suit were citizens of different States; the complainant, The Mercantile Trust Company, being, as alleged in said complaint, "a citizen of the State of New York within the meaning of the law fixing and determining the jurisdiction of this Honorable Court."

And the defendant, the Missouri, Kansas and Texas Railway Company, being, as alleged in said complaint, "a citizen of the State of Kansas within the meaning of the law fixing and determining the jurisdiction of this honorable court."

ANNIE LETCHER, Intervenor and Appellee
By JAMES P. WOOD, her Solicitor.

STATEMENT.

June 8, 1888, The Mercantile Trust Company of New York as complainant, filed its complaint in the United States Circuit Court for the district of Kansas, against the Missouri, Kansas and Texas Railway Company, a citizen of the State of Kansas, the object and purpose of which was to have certain mortgages and deeds of trust therein described, declared a lien on all the property and franchises of the said defendant; to enforce the payment of certain unpaid interest on bonds secured by said mortgage, or in default thereof, to have the said property and franchises sold to satisfy said mortgage debt together with all expenses incurred in said proceedings, and also to have Receivers appointed by said Court to take charge of and manage said property and franchises under the order and decrees of said Court.

Nov. 1st, 1888, George A. Eddy and H. C. Cross were appointed Receivers of the said, The Missouri, Kansas and Texas Railway Company by the said United States Circuit Court for the district of Kansas in said proceedings, and immediately thereafter they took charge of all the property and franchises of said The Missouri, Kansas and Texas Rail-

way Company, which among other things consisted of a line of railroad running from the City of Hannibal, Missouri, to Parsons, Kansas, and on through the Indian Territory to the City of Fort Worth, in the State of Texas, together with the locomotives, engines and cars; immediately thereafter ancillary proceedings in said cause were filed in the various United States Circuit Courts through whose jurisdiction said line of Railway ran, among others, the United States Circuit Court for the Northern Division of the Eastern District of Missouri, at Hannibal, Missouri.

The St. Louis and Hannibal Railway Company, a Missouri Corporation, was on August 2d, 1890, the owner of and operating a Railroad from Gilmore, in St. Charles county to St. L. & H. junction, a point on the M., K. & T. Railroad, about three miles southwest of Hannibal, in Marion County Missouri. Under a written contract between the former company and appellants as Receivers, all trains of the St. L. & H. Ry. Co. ran into the city of Hannibal from said junction over the tracks of the M., K. & T. Ry. Co., the entire distance being within the Hannibal "yard limits" of the latter company. On August 2d, 1890, there was a circus in Hannibal and the St. L. & H. Ry. Co. ran a special excursion train from Gilmore to Hannibal, leaving Gilmore at 6:15 A. M. and arriving at Hannibal Union Depot at 10:40 A. M. Harvey Letcher, the husband of appellee, was a passenger on the excursion train.

This train consisted of two baggage cars, Nos. 5 and 11, three passenger coaches, and lastly a caboose, coupled in the above order, the baggage cars being provided with temporary benches for the accommodation of passengers, with whom all the cars and coaches were well filled.

In approaching the Union Depot in Hannibal the M., K. & T. track crosses the Hannibal & St. Joe Railroad at a point between 50 and 100 feet south of the south end of the

depot building, and thence runs in a nearly straight line north along the east side of the depot building and covered platform a distance of about 400 feet, where it curves rather sharply to the northwest.

The easternmost track belonging to the Union Depot lies along and immediately west of this M., K & T. main track and with which it connects by means of a switch a little south of the south end of the depot building. The easternmost depot track is usually known as the M., K. & T. depot track and is used by that company in receiving and discharging passengers from the trains in the depot. It is also used by a portion of the trains of the St. L. & H. Company when not occupied by the trains of the M. K. & T. Company.

There are also in the depot yard a number of tracks provided for the accommodation of various railroads, including one usually known as the "Short Line track," but which was used by that company for such only of its trains as do not occupy the said M., K. & T. track in receiving and discharging its passengers. The only means of access to the "Short Line" track is through a switch some two or three blocks north of the depot.

At the time of the arrival of this St. L. & H. excursion train which passed through the yards as usual over the M., K. & T. tracks on the morning in question, this easternmost Union Depot track known as the M., K. & T. track, was occupied by an out-going south-bound M., K. & T. passenger train, whose rear end extended north to a point within the curve toward the north end of the covered depot platform above mentioned, thereby obstructing the view of the M., K. & T. main line around and north of the curve from the engineer of the incoming excursion train as it passed the depot building and along the covered platform before reaching the curve. By the same means of course a view of the approach-

ing train was obstructed from the M., K. & T. main line north of the curve.

The excursion train having come nearly or quite to a stop at a point south of the Hannibal & St. Joe crossing, and being signaled from the semaphore there stationed to proceed crossed the road and moved north until it had reached a point where its rear end cleared the switch of the above mentioned easternmost Union Depot track upon which the outgoing M., K. & T. passenger train was standing; this brought its engine onto the curve a little north of the rear end of the said M., K. & T. passenger train. Here it came into violent collision with an M., K. & T. switch engine drawing a freight train south from above the curve on the same track. Besides driving together and practically wrecking the two baggage cars in the excursion train, breaking in the end of one of the cars in the freight train, breaking the center pin and knocking the trucks from under another car in said freight train and more or less injuring the engines of both trains, the collision resulted in the death of one employee and three passengers on the excursion train; and among the latter being Harvey Letcher, the husband of the appellee herein.

Oct. 11, 1890, Annie Letcher, appellee herein, filed her intervening petition in said cause, in said United States Circuit Court for the Northern Division of the Eastern District of Missouri, at Hannibal, wherein she claimed damages in the sum of five thousand dollars against appellants, as Receivers of the said Missouri, Kansas and Texas Railway Company, on account of the death of her husband, the said Harvey Letcher, occasioned, as she averred, by the negligence of said appellants as such receivers, their agents, servants and employes. Appellants appeared, and having filed their answer in said cause in the matter of said intervening petition, the same was referred by the court to Hon. F. L. Schofield, the Master in Chancery of said court, to report to the court the law and

facts in said matter of said intervening petition. A hearing being had before said Master in Chancery, report was made thereon to said court on May 18, 1891, recommending a judgment for five thousand dollars in favor of appellee herein.

Exceptions having been filed by appellants to said report of the Master, the said exceptions were overruled by the Judge of the said Circuit Court, at Hannibal, on January 5, 1892, who then and there allowed said claim of the intervenor and rendered judgment for five thousand dollars in favor of the appellee herein as intervenor, and against appellants as Receivers of said Missouri, Kansas and Texas Railway Company, and ordered the same "paid unto the intervenor herein, or her solicitor of record, by George A. Eddy and Harrison C. Cross, the Receivers in this cause, out of any money or funds in their hands applicable to that purpose, or that it be paid by the persons or corporations who have succeeded to the possession of the property lately in the custody of said Receivers, who by the terms of the final decree, or previous orders in this cause, are chargeable with the payment of such claims."

An appeal from the judgment of the U. S. Circuit Court in said cause was duly taken by said Receivers to the United States Circuit Court of Appeals for the eighth circuit, and on hearing in said last named court the said judgment of the said U. S. Circuit Court was duly affirmed by said United States Circuit Court of Appeals, thereupon an appeal was prayed and allowed to this court.

BRIEF.

The jurisdiction herein in the first instance, as shown by the complaint filed by the Mercantile Trust Company, having been dependent solely on the fact that the opposite parties to the suit were citizens of different States, the judgment of the United States Circuit Court of Appeals is final, and no appeal therefrom will lie. The appeal herein should therefore be dismissed.

26 U. S. Stat. 826, 828, § 6, c. 517.
Wanton vs. DeWolf, 142 U. S. 138.
Colorado Central Mining Co. vs. Turck, 150 U. S. 138.

In the Wanton case, 142 U. S. 138, Mr. Chief Justice Fuller, delivering the opinion of the Court, said, at page 140: "By the Act of March 3, 1891, (26 Stat. 826, c. 517), establishing the Circuit Court of Appeals, the jurisdiction of this Court in cases dependent upon adverse citizenship was taken away."

In Colorado Central Mining Co. vs. Turck, 150 U. S. 138, Mr. Chief Justice Fuller, delivering the opinion of the Court, said, at page 141: "By the judiciary act of March 3, 1891, it is provided that the review by appeal, by writ of error, or otherwise, from existing Circuit Courts, shall be had in this Court, or in the Circuit Courts of Appeals thereby established, according to the provisions of the act regulating the same." The writ of error in this case was brought under Section six of that statute, which provides that "Judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of differ-

ent States," and also that "in all cases not hereinbefore, in this Section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars." 26 Stat., 826–828, §6, c. 517.

If the judgment of the Circuit Court of Appeals for the eighth circuit was final, under the section in question, then this writ of error must be dismissed. And in order to maintain that the decision of the Circuit Court of Appeals was not final, it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different States. Under the act of March 3, 1875, 18 Stat. 470, c. 137, Circuit Courts of the United States had original cognizance of all suits of a civil nature at common law or in equity, among others where the matter in dispute exceeded, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or in which there was a controversy between citizens of different States. This complaint was filed December 2, 1885, and alleged the diverse citizenship of the parties as the ground of jurisdiction. But it is said that the vital question raised in the case was whether the patentee of a lode claim, etc. * * * *

This view, however, ignores the settled doctrine that the inquiry, in cases such as this, into the jurisdiction of the Circuit Court is limited to the facts appearing on the record in the first instance. This has been often so held in the enforcement of the inflexible rule which requires this court in the exercise of its appellate power to deny the jurisdiction of the courts of the United States in all cases where such jurisdiction does not affirmatively appear in the record on which it is called upon to act. * * * * *

The jurisdiction of the Circuit Court was invoked, December 2, 1885, by the filing of the complaint, from which

it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was rested or could be asserted on any other ground. The Federal question now suggested did not emerge until the defendant set up his second defense, and not then unless deducible from the bare averment that it obtained under the senior discovery and patent, which was admitted in the replication. * * * * The jurisdiction had, however, already attached, and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred."

It is respectfully submitted, in the light of the above authorities, and in view of the facts in this case, that this Honorable Court is without jurisdiction to hear, try or determine this cause on appeal, and the appeal herein ought to be dismissed.

JAMES P. WOOD,
Solicitor for Appellee.

DEC 13 1894
JAMES H. McKENNEY,
Cl.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

GEO. A. EDDY AND H. C. CROSS, RECEIVERS OF THE MISSOURI, KANSAS & TEXAS RAILWAY,
APPELLANTS,
vs.
ANNIE LETCHER, INTERVENER, ETC.,
APPELLEE.
No. 1582

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL.

JAMES HAGERMAN,
GEO. P. B. JACKSON,
Attorneys for Appellants.

Nixon-Jones Printing Co., 215 Pine Street.

IN THE

Supreme Court of the United States.

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GEO. A. EDDY AND H. C. CROSS, RECEIVERS OF THE MISSOURI, KANSAS & TEXAS RAILWAY,

APPELLANTS,

vs.

ANNIE LETCHER, INTERVENER, ETC.,

APPELLEE.

No. 1026.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL.

Sections 5 and 6 of the act establishing the Circuit Courts of Appeals, approved March 3d, 1891, prescribe what cases may be appealed from the trial court direct to the Supreme Court, what to the Circuit Courts of Appeals, and what from the Circuit Courts of Appeals to the Supreme Court. These sections are as follows:—

"Sec. 5. That appeals or writs of error may be taken from the district courts or from the existing cir-

cuit courts direct to the Supreme Court in the following cases:

(1) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

(2) From the final sentences and decrees in prize causes.

(3) In cases of conviction of a capital or otherwise infamous crime.

(4) In any case that involves the construction or application of the constitution of the United States.

(5) In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

(6) In any case in which the constitution or law of a State is claimed to be in contravention of the constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for a review of such cases."

"Sec. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision (s) in the district court (s) and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and *the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being* aliens and citizens of the United States or *citizens of different States:* also in cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases.

Excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United

States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such cases, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed."

The appellee seeks by her motion in this case to dismiss the appeal because as she claims, the jurisdiction of the Circuit Court before which the case was originally tried, *depended entirely upon the opposite parties to the suit or controversy being citizens of different States.* The premises of the learned counsel for appellee are fundamentally erroneous. The *controversy* in the Circuit Court did not *depend* on the *different citizenship* of the parties. The appellee came into the foreclosure suit as an intervener, — filing her intervening petition. It is true that originally the Circuit Court took jurisdiction of the foreclosure cause, on

the ground that the Mercantile Trust Company, the complainant, was a citizen of New York, and the defendant, the Missouri, Kansas & Texas Railway Company, a citizen of Kansas.

The cause of action of the appellee arose long after the Circuit Court had taken jurisdiction and the receivers had been appointed. The claim of appellee arose out of an alleged collision between a locomotive engine operated by employes of the receivers, and the train of another railway company, wherein her husband was killed. The appellee's right to sue in the Federal court did not depend upon the diverse citizenship of herself and the receivers. The receivers were officers of the Federal court, and if the appellee has any cause of action against them by reason of anything done by them in the course of their receivership, then her suit is one arising under the constitution and laws of the United States, and the jurisdiction of the Circuit Court was not dependent on the diverse citizenship of the appellee and the receivers. It is well settled that an intervening claimant in a railway foreclosure suit in the Federal courts can establish his or her rights against the receivers or against the earnings of the receivers, or the *corpus* of the property in the possession of the receivers, without reference to his or her citizenship or the citizenship of the receivers or of the railway company. In recent years there have been multitudes of such suits of intervention in the Federal courts throughout the country, and no one longer pretends to claim that the jurisdiction of the court to determine a controversy presented on the petition of the intervening claimant depends upon the citizenship of the parties to such controversy. These suits of intervention become necessary because the property sought to be charged is *in custodia legis*. They are suits within a suit, and a controversy which arises upon one of these inter-

vening petitions is separable and distinct from the other controversies in the case — a separate final hearing is had, and a separate decree rendered, from which there is a separate and distinct right of appeal.

In Stewart *v.* Dunham, 115 U. S., p. 62, *et seq.*, this court, in an opinion by Mr. Justice Mathews, speaking of the nature of a controversy between an intervening claimant and other parties to the cause, said (p. 64): —

> "The right of the court to proceed to decree between the appellants and the new parties did not depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing."

This doctrine was announced where the intervening claimant claimed the same relief precisely against the defendant as that asked by the original complaint.

In the case at bar the intervening claimant is not asking the relief prayed by the original complaint, nor joining in the original complainant's suit, but brings a suit by way of intervention in the original suit against representatives of the property which is in the custody of the law,

alleging that since the Federal court acquired jurisdiction of the cause, and through its receivers took possession of the property, the receivers of the court have caused her damage, for which the receivers in their official, not their personal, capacity are liable, and for which the property in their possession is chargeable.

In the case of the Texas & Pacific Railway Company *v.* Cox, 145 U. S., p. 593, et seq., this court distinctly ruled in an opinion delivered by Mr. Chief Justice Fuller that the Federal courts could take jurisdiction of a suit for damages against the receivers of a railway appointed in foreclosure proceedings by a Federal court, without reference to the citizenship of the parties, and held (p. 603), that jurisdiction existed because the suit was one arising under the constitution and laws of the United States, inasmuch as the receivers derived their authority from, and operated the road in obedience to the orders of a United States Circuit Court in the exercise of its judicial powers.

If it be true, as claimed by appellee's counsel, that the jurisdiction of the controversy which is sought to be reviewed on this appeal, depended on the different citizenship of the parties, then the proper order for this court to make at this time in this case would be, not to dismiss the appeal, but to dismiss the appellee's intervening suit, for in the intervening petition filed by the appellee there is no averment as to the citizenship of the intervener or of the receivers.

The cases cited by appellee, Wauton *v.* DeWolf, 142 U. S. 138, and Colorado Central Mining Co. *v.* Truck, 150 U. S. 138, are not in conflict with Stewart *v.* Dunham and Texas & Pacific Ry. Co. *v.* Cox, supra. In the Wauton and Mining Company cases the jurisdiction of the Federal court depended entirely upon the diverse citizenship of the

parties, and in the case at bar the jurisdiction does not depend at all upon such diverse citizenship.

Respectfully submitted,

JAMES HAGERMAN,
GEO. P. B. JACKSON,
Attorneys for Appellants.